No. 474

In the Supreme Court of the United States

October Term, 1950

Robert D. Elder, Cherrie Chandler Fuhrman, petitioners

v.

Charles F. Brannan, Secretary of Agriculture

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 474

ROBERT D. ELDER, GREENE CHANDLER FURMAN,
PETITIONERS

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The memorandum opinion of the district court (R. 72) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 88) is reported at 184 F. 2d 219.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1950 (R. 96). A petition for rehearing, filed on June 30, 1950 (R. 97), was denied on Oc-

tober 2, 1950 (R. 100). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Civil Service Commission's "Retention Preference Regulations," promulgated pursuant to Section 12 of the Veterans Preference Act of 1944, violate that section by providing that, in a reduction in force, non-veterans with classified civil-service status are entitled to preference over veterans without classified status.

STATUTE AND REGULATIONS INVOLVED

Section 4 of the Act of August 23, 1912 [1] (37 Stat. 413, 5 U. S. C., 1934 ed., Sec. 648) provides:

> SEC. 4. The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for

[1] Section 4 was repealed by Public Law 873, 81st Cong., 2d Sess., approved September 30, 1950.

inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided,* That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

Section 18 of the Veterans Preference Act of 1944 (58 Stat. 391, 5 U. S. C. § 867) provides:

> All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.

Section 12 of the Veterans Preference Act of 1944 (58 Stat. 390, 5 U. S. C. Supp. III § 861) and pertinent portions of the Civil Service Commission "Retention Preference Regulations" (12 F. R. 2850, 5 CFR (1949) §§ 20.3, 20.8) are set forth in

the Appendix to the petition in No. 473, this Term (pp. 14-15, 18-21).

STATEMENT

The statement is set forth in the petition for a writ of certiorari filed by respondent in *Charles F. Brannan* v. *Robert D. Elder and Greene Chandler Furman*, No. 473, this Term, which involves the same judgment sought to be reviewed by the present petition.

ARGUMENT

The judgment of the court below (R. 96) was that, on the facts presented, petitioners were entitled to reinstatement and respondent has already filed in this Court a petition for a writ of certiorari to review that judgment. *Charles F. Brannan* v. *Robert D. Elder and Greene Chandler Furman*, No. 473, this Term. Petitioners do not claim or show that they are entitled to greater relief than the judgment below affords them. There would seem, therefore, to be no reason for this petition. If the petition in No. 473 is denied, petitioners will be satisfied; if that petition is granted, petitioners will have the opportunity to urge any proper ground as the basis for affirming the decision below. Nevertheless, we do not oppose granting this petition in the event respondent's petition in No. 473 is granted.

If the respondent's petition is denied, however, we feel this petition should not be granted, not only because petitioners have nothing to gain by the

grant but also because the decision of the court below on the question raised herein is correct. Section 12 of the Veterans Preference Act of 1944 specifically provides that "In any reduction in personnel * * * competing employees shall be released *in accordance with Civil Service Commission regulations* which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings * * *." (Italics supplied.) The Commission promulgated its "Retention Preference Regulations" shortly after passage of the Act. (9 F. R. 13699). They have remained substantially the same to date and were approved in part by this Court in *Hilton* v. *Sullivan*, 334 U. S. 323. This "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion" is entitled to great weight. *United States* v. *American Trucking Associations*, 310 U. S. 534, 549. Moreover, the regulations are, in relevant part, simply an extension of the practice in effect since 1923. *Hearings before the Senate Committee on Civil Service On S. 1762 and H. R. 4115*, 78th Cong., 2d Sess., p. 27. The regulations in force at the time of the passage of the Act (5 CFR (Supp. 1943) §§ 12.301-12.313) drew the same distinction between permanent and non-permanent employees as do the present regulations. See *Hilton* v. *Sullivan*, *supra* at p. 337, note 10. There is no evidence that Congress intended to change the prior practice. The statute provides only that preference em-

ployees shall be retained in preference to "competing employees." It is certainly not unreasonable for the Commission to rule that men with classified civil service status are not competitors of temporary employees such as petitioners.

Petitioners can derive no benefit from the proviso to Section 4 of the Act of March 3, 1912, upon which they rely so heavily. That proviso was superseded by the 1944 Act,[2] Section 18 of which saved to veterans "any rights heretofore granted to, or possessed by [them], under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." But Section 18 preserved veterans' rights under the proviso as it had been interpreted by Executive order and Civil Service Commission regulations prior to 1944. See *Hearings, supra,* at p. 27. The proviso had not then been construed to grant veterans with temporary status preference over non-veterans with superior status.[3] Rather, we have a consistent administrative construction of at least twenty-seven years standing supporting the regulations attacked. There is no evidence in the 1944 Act or in its legislative history that Congress contemplated a change in that policy; on the contrary, what evidence there is points the other way. We believe, therefore, that the decision of

---

[2] H. Rep. No. 1289, 78th Cong., 2d Sess. p. 7.

[3] E. O. 3567; E. O. 3801; E. O. 4240; E. O. 5068; E. O. 8587; E. O. 8705; E. O. 9063; Civil Service Commission "Reduction in Force" Regulations, 5 CFR (Supp. 1943) §§ 12.301-12.313.

the court below was correct and that there is no need for review by this Court.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
NEWELL A. CLAPP,
Acting Assistant Attorney General.
PAUL A. SWEENEY,
ARTHUR W. MURPHY,
Attorneys.

JANUARY 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 926803 435